IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3797 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Nos. 1 to 5 No

KANTIBHAI JHALABHAI VAGHARI

Versus

DISTRICT MAGISTRATE

Appearance:

MS DR KACHHAVAH for Petitioner

MS.SIDDHI TALATI, ASSISTANG GOVERNMENT PLEADER for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 25/11/98

ORAL JUDGEMENT

Prayer in this writ petition under Article 226 of the Constitution of India is to quash through a writ of certiorari the detention order dated 10.3.1998 passed by District Magistrate, Kheda at Nadiad under section 3(2) of the Prevention of Antisocial Activities Act,1985 (for short 'PASA') and for a writ of habeas corpus for

immediate release of the petitioner from illegal detention.

The District Magistrate, Kheda at Nadiad passed the impugned order, Annexure "A", under section 3(2) of the PASA Act, and simultaneously furnished the grounds of detention Annexure "B" to the petitioner. The activities of the petitioner which were considered to be antisocial and creating disturbance in public order were highlighted in the grounds of detention. It seems that the Detaining Authority arrived at a subjective satisfaction that the petitioner is a bootlegger and engaged in the business of selling, distilling, transporting and storing country made liquor and also at times he had quarrelled with witnesses under drunken state and extended threats to the witnesses with Rampuri knife etc. which created disturbance of public order in the locality. The Detaining Authority also considered alternative remedies and found the same to be ineffective to curb antisocial activities of the petitioner. As such the impugned order was passed.

Learned Counsel for the petitioner has challenged the impugned order only on two grounds.

The first ground has been that the representation of the detenu sent through his Advocate to the District Magistrate for onward transmission and consideration by the State Government was not considered by the State Government, hence the detention of the petitioner as well as continued detention has been rendered illegal. From the counter affidavit of Shri J.R.Rajput, Under Secretary to Government of Gujarat, it appears from para 2 that the representation dated 23.6.1998 was addressed to the Detaining Authority. The Detaining Authority viz. the District Magistrate through his letter dated 4.7.1998 transmitted the same to the State Government. The Home Department of the State Government received this communication along with representation of the detenu on 17.7.1998. Upon scrutiny the Home Department found that the representation did not bear signature or thumb impression of the detenu nor the representation was accompanied with any Vakalatnama etc. of the Advocate for the detenu. It was therefore returned to the Advocate for the detenu by the State Government under its letter dated 18.7.1998 and since thereafter no compliance was received from the Advocate of the detenu the State Government could not consider the representation. From this para of the counter affidavit three points emerge for consideration. The first is whether the State Government should have taken such technical view in

returning the representation to the Advocate of the detenu for compliance viz. for obtaining signature of the detenu and also for filing Vakalatnama from the detenu. This stand of the State Government can hardly be justified in view of pronouncement of the Apex Court in Balchand Chorasia Vs. Union of India, AIR 1978 SC Pg.297. In this case the representation was sent by the Advocate of the detenu who happened to be the Member of Parliament. The contention was that the representation of the detenu was not considered by the Government on the ground that it was not from the detenu. The Apex Court however observed that Shri Ramjethmalani did not send the representation in the capacity as Member of Parliament, rather, it was sent by him as an Advocate of the detenu-petitioner. The Supreme Court therefore, heavily commented upon inaction of the Government in not considering such representation on mere technical ground. It observed and emphasised that where the liberty of a citizen is proposed to be curtailed the representation should not be dealt with on technical grounds. Since the representation of the detenu was dealt with on technical grounds the order of detention, in the opinion of the Apex Court, was illegal hence, it was set aside. In view of this verdict of the Apex Court which was given as late as 1978 the stand of the Government was hardly justified. It has its legal department and it could have easily sought opinion of the legal department whether such action is justified or not. Thus, in the first place the State Government was not justified in taking such technical stand.

In the second place there is no requirement that where a representation is sent by an Advocate mentioning therein that he or she was sending the same under the instructions of the detenu that he or she is obliged to file Vakalatnama or authority letter from the detenu. The representations and notices under the instructions of the client are not required to be accompanied with authority letter or Vakalatnama. Mere recital in the representation that it was being sent under the instructions of his or her client is sufficient compliance of law. The State Government, therefore, could not have compelled the Advocate of the detenu to make further compliance.

The third point for consideration in this case is whether the Advocate of the detenu should have made it a prestige point in not sending reply to such communication of the State Government I feel that the learned Advocate should not have made a prestige point and should have intimated the State Government and should have returned

the representation to the State Government for not insisting upon uncalled for compliance.

The fact however, remains that for this tug of war between the State Government and the Advocate of the detenu the representation could not be disposed of sofar. This therefore, takes me for consideration of another aspect whether the representation was dealt with expeditiously or not. This point has not been raised by the learned Advocate for the petitioner. It however emerges from the admission of Shri J.R.Rajput, Under Secretary, in para 3 of his counter affidavit. It shows that the detenu made representation on 23.6.1998 to the Detaining Authority which was received by the Detaining Authority and he remained silent upto 4.7.1998. Thus, during this period the Detaining Authority did not take action of forwarding the representation to the State Government. This delay has neither been explained in the affidavit of the Detaining Authority nor in the affidavit of the Under Secretary. It is further deposed that the communication and the representation sent by the District Magistrate through his letter dated 4.7.1998 was received in the Home Department of the State of Gujarat on 17.7.1998. There is no mention in what manner this communication was despatched. Judicial notice can be taken of the short distance between Kheda and Gandhinagar. Even ordinary letter should not have taken such time to reach Gandhinagar from Kheda. This delay has also not been explained. It is only the authority in the Home Department which from postal seal or endorsement could have said on affidavit as to when such letter was actually posted in the post office and in what manner and when it was received in the Home Department. Thus the delay between 4.7.1998 to 17.7.1998 also remained unexplained. Under these circumstances the delay in expeditious disposal of the representation between 23.6.1998 to 17.7.1998 remained unexplained and this unexplained delay itself is a ground for quashing the detention order.

The next ground of attack is that the activities of the petitioner cannot be said to be prejudicial to maintenance of public order. This contention has substance. Even if the petitioner is a bootlegger within the meaning of section 2(b) of the PASA Act, he cannot be placed under preventive detention simply on that ground. It has to be further shown that the activities of the petitioner as bootlegger were prejudicial to the maintenance of public order. If five cases under Prohibition Act were registered against the petitioner it can be said that he was effectively dealt with under the

ordinary law for creating law and order problem under the Prohibition Act and such activity or repeated activity per se does not constitute activity prejudicial to maintenance of public order or had disturbed the public order.

In the grounds of detention the statements of four witnesses who preferred to remain secret about their identities and addresses have also been disclosed and from their statements the Detaining Authority reached subjective satisfaction that the activities of the petitioner were creating disturbance in public order. Alterntive remedies were also considered by the Detaining Authority and he found that alternative remedies under section 93 of the Prohibition Act, under sections 57(g) and 56(b) of the Bombay Police Act would not be effective remedies. If the incidents narrated by the witnesses are closely scrutinised it seems that these are stereotype narration by the witnesses which is forthcoming in almost every case. This observation is fully supported from the narration of incident given by witness no.1. While describing incident dated 10.2.1998 this witness seems not to have said anything that he raised any alarm or that any person collected at the place of incident. If this is so, then his narration that people had run away due to fear of the petitioner is nothing but sheer imagination. If there is no statement or allegation that any person other than the petitioner and the victim collected at the spot there was no question of their running away from the spot. If one incident seems to be imaginary there is no guarantee that the remaining incidents are true. In any event this incident could have created situation which might have disturbed law and order and not public order. Merely reciting in the grounds of detention that public order was disturbed is not enough for upholding that such situation actually arose which created problem for maintenance of public order or the activities were prejudicial to maintenance of public order. Further, the activities of the petitioner which were highlighted by the witnesses had no direct nexus with his alleged illegal activities of bootlegging. If the petitioner was extending threats on another ground, may be for extracting money or for pressurising persons, it cannot be said that it was directly concerned and connected with his illegal activity of bootlegging. The petitoner was not placed under preventive detention because he was dangerous person. The activities disclosed by the witnesses could have constituted offences punishable under Chapters XVI and XVII of the Indian Penal Code but since in the grounds of detention it was not indicated that the

petitioner was a dangerous person his activities could not be taken to be sufficient for curtailing his liberty by putting him under preventive detention.

For the reasons stated above the impugned order of detenttion cannot be sustained. The result therefore is that the petition succeeds and is hereby allowed. The impugned order of detention dated 10.3.1998 is hereby quashed. The petitioner shall be released from custody forthwith unless he is wanted in connection with some other criminal case.

Sd/-
(D.C.Srivastava, J)

m.m.bhatt